Petition

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANN FERRELL DACUS,

PETITIONER,

VS.

SOUTHERN COLLEGE OF OPTOMETRY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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SOUTHERN COLLEGE OF OPTOMETRY,

RESPONDENT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Ann Ferrell Dacus, the petitioner herein, hereby petitions this Honorable Court pursuant to 28 USC § 1254(1), that a Writ of certiorari issue to review the Judgment of the UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT which was entered by said court in the above styled case on August 5, 1981.

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QUESTIONS PRESENTED FOR REVIEW

ARE THE VARIOUS CIRCUITS OF THE UNITED STATES COURT OF APPEALS CONFLICTING AS TO THE PROPER DETERMINATION OF THE AMOUNT OF BACK PAY AWARD REQUIRED TO MAKE A PLAINTIFF WHOLE IN A 42 USC § 2000e CASE, AND IS SUCH DETERMINATION OF THE PROPER AMOUNT OF BACK PAY REQUIRED OF SUCH GRAVITY AND GENERAL IMPORTANCE AS TO REQUIRE SETTLEMENT OF THE ISSUE BY THE SUPREME COURT OF THE UNITED STATES?

DOES THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DEPART SO SUBSTANTIALLY FROM ACCEPTED JUDICIAL PROCEEDINGS AND STANDARDS AS TO REQUIRE EXERCISE BY THE SUPREME COURT OF ITS SUPERVISORY AUTHORITY IN THIS CASE?

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REFERENCE TO OPINIONS BELOW

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit, which was decided and filed on August 5, 1981, is reported in the Federal Reporter, appearing at 657 F2d 81 (1981). A copy of said Judgment of the Sixth Circuit Court of Appeals appears herein at page 35 in the Appendix hereto, as required by Rule 21(k) of the Supreme Court of The United States.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

The memorandum decision of the United States District Court for the Western District of Tennessee, Western Division, was unreported in any official or unofficial reporter, so far as is

known to counsel for Petitioner. Said memorandum decision, which was decided and filed on July 3, 1979, and the final Judgment of the United States District Court which was entered on July 12, 1979, pursuant to said memorandum decision are included in the Appendix hereto, as required by Rule 21(k) of the Supreme Court of The United States, with a copy of said memorandum decision appearing at page 40 and a copy of said final Judgment appearing at page 60.

JURISDICTIONAL STATEMENTS

DATE OF JUDGMENT SOUGHT TO BE REVIEWED:

The date of the Judgment sought to be reviewed, which is the final Judgment of the United States Court of Appeals for the Sixth Circuit, is August 5, 1981, the date of entry of said Judgment also being August 5, 1981.

DATE OF ORDERS RESPECTING REHEARING OR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI:

No petition of motion for rehearing was filed regarding the Judgment of the United States Court of Appeals for the Sixth Circuit decided and filed on August 5, 1981, of which review is hereby sought by Writ of Certiorari. No application of petition for extension of time to file a petition for writ of certiorari herein has been filed, and accordingly, no orders

regarding any extension of time to file this Petition for Writ of Certiorari have been entered.

STATUTORY PROVISION CONFERRING JURISDICTION UPON THE SUPREME COURT OF THE UNITED STATES FOR REVIEW BY WRIT OF CERTIORARI:

Jurisdiction to review the final Judgment of the United States Court of Appeals for the Sixth Circuit dated August 5, 1981, is conferred upon the Supreme Court of the United States by the provisions of 28 USC § 1254(1) which specifically provides for review by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following Constitutional provisions and statutes, which are set forth verbatim:

United States Constitution- Amendment 14 Section I Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to nay person within its jurisdiction the equal protection of the laws.

28 USC § 1254 (1) Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC § 1291 Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

42 USC § 2000e-2 (e) Religion, sex, or national origin as bonafide occupational

qualification; educational institutions with employees of particular religions.

Notwithstanding any other provision of this title (42 USC §§ 2000e et seq.), (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for and employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of

that particular business or enterprise ; and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 USC § 2000e-5 (g) Injunctions; affirmatibe action; equitable relief.

If the court finds that the respondent has intentionally engaged in or

is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, resposible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operated to reduce the back pay otherwise allowable. No order of the Court shall require the admission or reinstatement of an individual as a member

of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704 (a) (42 USCS § 2000e-3(a)).

STATEMENT OF CASE

Ann Ferrell Dacus, the Plaintiff in this case, was a female employee of the Defendant, Southern College of Optometry, from 1968 to June 30, 1978.[1] Southern College of Optometry is a general welfare corporation organized and operated under the laws of the State of Tennessee, is owned by a Board of Trustees, and operates an educational institution granting degrees in the field of optometry.[2]

This case originated in the United States District Court for the Western District of Tennessee, Western Division, upon the Complaint of Ann Ferrell Dacus charging the Defendant, Southern College of Optometry, with sex

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[1] See page 11 of the memorandum decision of the United States District Court, which appears herein in the Appendix at page 40 . referred to in footnotes as memorandum decision.

[2] See page 1 of memorandum decision.

discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e, following the filing of a claim with the Equal Employment Opportunity Commission by the female Plaintiff.[3]

After a somewhat lengthy trial, the Honorable Judge Robert M. McRae concluded that Southern College of Optometry did indeed violate the sex discrimination provisions of 42 USC § 2000e with respect to the Plaintiff through its agents and high ranking executives, Dr. Spurgeon Eure, Dr. Vonne F. Porter, and Claude Pullen. The District Court found as matters of fact, that Southern College of Optometry treated females as inferior and exploited them, and further, that ranking executives of Southern College of Optometry asked

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[3]See memorandum decision page 1

sexual favors of female employees and made advances towards them, specifically including the Plaintiff, Ann Ferrell Dacus.[4]

The United States District Court also found as a matter of fact, that Southern College of Optometry illegally discriminated against Ann Ferrell Dacus from October 1, 1972, to June 30, 1975, by assigning her substantially all the duties of her male counterpart, but paying her substantially less salary for those same duties on account of her sex.[5]

The United States District Court further specifically found as a matter of fact that Southern College of Optometry did not impermissably discriminate against the Plaintiff on June

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[4]See page 3 of memorandum decision.

[5]See page 7 of memorandum decision.

30, 1975, when the Plaintiff was transferred from one department to another department within the college, and that Southern College of Optometry did not impermissably discriminate against the Plaintiff when her employment was terminated on June 30, 1978.[6]

Both the finding of no impermissable discrimination regarding the June 30, 1975, transfer and the finding of no impermissable discrimination of employment are maintained by the Plaintiff to be not only clearly erroneous and unsupported by the evidence at trial, but both are maintained to be inconsistent with the remaining findings of fact contained in the United States District Court's memorandum decision of July 3, 1979.

The United States District

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[6] See page 8 of memorandum decision.

Court awarded the Plaintiff back pay in the amount of $8253.00 plus Attorneys fees upon the finding of discrimination between October 1, 1972, and June 30, 1975,[7] but, according to its finding of no discrimination in the June 30, 1975 transfer and the subsequent June 30, 1978, termination of employment, the District Court did not award the Plaintiff back pay for the period of June 30, 1975, through June 30, 1978, and likewise, did not order reinstatement.[8]

The United States District Court derived this back pay figure of $8253.00 as ostensibly being the difference between the actual earnings of the Plaintiff during the period from October 1, 1972, to June 30, 1975, and what was purported by the District Court

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[7]See page 9 of memorandum decision.

[8]See page 8 of memorandum decision.

to be the "salary she should have earned" during the same period. The "salary she should have earned" was determined by the District Court to be the same salary her male counterpart was earning on October 1, 1972, the date the discrimination began.[9] No consideration was given to or allowance made for any increases in the "salary she should have earned" due to anticipated raises, inflationary increases, and the like.

Both sides appealed the District Court's decision to the United States Court of Appeals for the Sixth Judicial Circuit.[10]

Ann Ferrell Dacus cited as error the failure of the District Court to find discrimination in the June 30, 1975, transfer and in the June 30, 1978,

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[9]See pages 8-9 of the memorandum decision.

[10]The citation of error contained herein

termination of employment along with the failure to order reinstatement, and further cited as error the manner of determining the proper amount of backpay for the period from October 1, 1972, to June 30, 1975.

Southern College of Optometry cited as error the alleged impropriety of introduction of evidence regarding sexual advances towards female employees by agents and ranking executives of Southern College of Optometry, the alleged personal bias of the Trial Judge, the Honorable Robert M. McRae, the factual finding that the Plaintiff performed substantially all the duties of her male predecessor, and the alleged erroneous ruling upon Southern College of Optometry's motion to dismiss the

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[10]- which is attributed to Ann Ferrell Dacus and to Southern College of Optometry is derived from the errors as cited in their respective brief's to the Sixth Circuit Court of Appeals.

Plaintiff's Complaint on account of the alleged filing of a charge of discrimination with the Equal Employment Commission by the Plaintiff more than 180 days from the discrimination complained of. Southern College of Optometry also took issue with the District Court's manner of determining the amount of back pay to which the Plaintiff would be entitled, assuming discrimination was found.

The United States Court of Appeals for the Sixth Circuit in a per curiam decision rendered August 5, 1981, affirmed the decision of the District Court, first setting out verbatim a substantial portion of the District Court's memorandum decision, then stating, "This Court's review of this record indicates that we cannot hold that any of the findings of fact of the District Court are clearly erroneous,

therefore, the Judgment of the District Court is affirmed."[11]

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[11] Language quoted appears at page 83 of 657 F2d of published opinion.

BASIS FOR FEDERAL JURISDICTION BELOW

BASIS OF JURISDICTION OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

The United States District Court for the Western District of Tennessee, Western Division, properly exercised its jurisdiction in this cause pursuant to 28 USC § 1848 and 42 USC § 2000e, et seq., as this cause was a suit in equity to redress discrimination against the Plaintiff in her employment on the basis of sex by the Defendant corporation organized and operating under the laws of the State of Tennessee.

BASIS OF JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

The United States Court of Appeals for the Sixth Circuit properly exercised its appellate jurisdiction

in this cause to review the decision of the United States District Court for the Western District of Tennessee, Western Division, pursuant to the provisions of 28 USC § 1291.

AMPLIFICATION OF REASONS FOR GRANTING THE WRIT

THE AUTHORITY ON PROPER DETERMINATION OF THE AMOUNT OF BACK PAY AWARD REQUIRED TO MAKE A PLAINTIFF WHOLE IN A 42 USC § 2000e CASE IS CONFLICTING BETWEEN THE VARIOUS CIRCUITS OF THE UNITED STATES COURTS OF APPEALS AND IS OF SUCH GRAVITY AND GENERAL IMPORTANCE AS TO REQUIRE SETTLEMENT OF THE ISSUE BY THE SUPREME COURT OF THE UNITED STATES.

It would seem to be self-evident that the issue of the measure of back pay to be awarded in a 42 USC § 2000e case is an issue of gravity and general importance by mere consideration of the number of 42 USC § 2000e cases being heard in the District Courts each year.

Although this Court has ruled that the objective and purpose of Title VII encompasses fashioning "make whole"

relief, and that this relief should normally include back pay,[12] this Honorable Court has never laid down any guidelines as to the proper determination of the amount of or how to determine back pay.

Further, although the Court in Unger v. Consolidated Food Corp.[13] stated "It is well established that the trial Court has broad discretion in awarding back pay and that its method of assessing the amount of back pay will be set aside only for an abuse of discretion", and numerous other circuits are in accord[14] UNBRIDLED DISCRETION in the determination of the amount of back pay is not

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[12] Albermarle Paper Co. v. Moody, 422 U. S. 405 (1975)

[13] 657 F.2d. 909 (1981)

[14] See e.g. Sherkow v. Wisconsin Dept. of Public Instruction, 630 F.2d. 498, 504 (7th Cir. 1980); Comancho v.

within the spirit and purposes of 42 USC § 2000e. As stated by this Honorable Court in Franks v. Bowman Transportation[15], "Discretion is vested not for the purposes of "limiting appellate review of trial courts, or .... inviting inconsistency and caprice", but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." Discretion in awarding back pay, then, must make the Plaintiff whole in the most complete manner possible under the facts and circumstances of the specific case at hand. Likewise with reinstatement.

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[14]- Colorado Electrical College, Inc., 590 F.2d. 887 (10th Cir. 1979); and Thorton v. East Texas Motor Freight, 497 F.2d. 416 (6th Cir. 1974)

[15]424 U.S. 747, at 770 (1976) (emphasis added)

District Courts throughout the Circuits have utilized different methods to compute the amount of back pay that is necessary to "make whole" the Plaintiff. The method utilized in Verzoza v. Merril Lynch, Pierce, Fenner, & Smith, Inc.,[16] seems to be the method most widely used, and further, seems to be the correct method when bearing in mind the "make whole" objective of Title VII. In the Verzoza case, the award of back pay was determined to be the difference between the earnings which the Plaintiff would have earned during the period of discrimination absent such discrimination, and the amount of the Plaintiff's actual earnings. The Court in the Verzoza case determined the earnings which the Plaintiff would have earned during the period of discrimination by taking

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[16] 589 F.2d. 974 (9th Cir. 1979)

into consideration annual increases in earnings, expected merit raises, promotions, inflationary increases, and the like. Other courts have followed the course taken in the present case, that is, the back pay award was determined by the difference in what the Plaintiff would have earned absent discrimination and the actual earnings of the Plaintiff during the period of discrimination, with a different manner of determining "what the Plaintiff would have earned". In this case, the amount of earnings that the Plaintiff, Ann Ferrell Dacus "would have earned" was determined without taking into consideration any increases whatsoever [17] during the period of discrimination, but instead, the amount that she "would have earned" at the start of the dis-

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[17] See page 9 of the memorandum decision

criminatory period was used as the amount she would have earned throughout the period. This was the same approach taken by the Court in Unger v. Consolidated Foods, Inc.[18]; no adjustments were made for any inflationary increases, merit raises, promotions, or the like.

These two different, conflicting methods of arriving at the amount of earnings which the Plaintiff "would have earned" can, and usually do result in whopping differences in identical factual situations. While it is conceded that there are many elements to be used in calculating back pay[19], it is contended that failure to take into consideration any increases in earnings whatsoever, and using the expected earnings of the Plaintiff at the

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[18] 657 F.2d. 909 (1981)

[19] See e.g. raises as a factor, Anderson v. Methodist Evangelical Hospital, 464 F.2d. 723 (6th Cir. 1972)

beginning of the period of discrimination and utilizing that figure throughout the period of discrimination results in less than what was intended to redress damages under 42 USC § 2000e.

Indeed, the failure to include any increases during the discriminatory period, not even inflationary, leaves "little incentive to shun practices of dubious legality." [20] Just as the Court recognized in Albermarle Paper Company v. Moody[21], that the "reasonably certain prospect of back pay"... provides the spur or catalyst which cause employers and unions to self-examine their employment practices and endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," without which

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[20] Albermarle Paper Company v. Moody, 422 U.S. 405, at 417 (1975)

[21] 422 U.S. 405, at 417 (1975)

there would be the aforementioned "little incentive" to follow the law.

There is a substantial need for the Supreme Court of the United States to determine that an employer may not discriminate as prohibited by 42 USC § 2000 e and subject himself to only the risk of paying back pay at an artificially low rate determined as of point in time when the discrimination began. Standards and factors for determining the amount of earnings that would have been earned are needed to prevent awards which vary in the same factual circumstances by as much as a years salary to the Plaintiff's.

In summary, review by the Supreme Court is proper in this case because of the importance of this issue.[22]

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[22] Shapiro v. United States, 235 U.S. 412 (1914)

REVIEW BY THE SUPREME COURT OF THE UNITED STATES IS PROPER IN THIS CASE AS AN EXERCICISE BY THE COURT OF ITS SUPERVISORY AUTHORITY, IN THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SANCTIONED A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WHICH IS WHOLLY INCONSISTENT, SELF-CONFLICTING, AND IRRECONCILABLE WITH THE FINDINGS OF FACT MADE BY THE DISTRICT COURT ITSELF, AND THUS DEPARTING SUBSTANTIALLY FROM ACCEPTED JUDICIAL DETERMINATIONS AND PROCEEDINGS.

The Decision of the United States District Court in this case and the finding that the Plaintiff was not discriminated against when she was terminated on June 30, 1977, was not only inconsistent with the evidence and clearly erroneous, but is totally inconsistent with the other factual determinations of the District Court itself. By affirming

the aforementioned decision of the United States District Court, the United States Court of Appeals for the Sixth Circuit has fully sanctioned the aforementioned substantial departure from accepted judicial standards by the District Court.

The District Court found as matters of fact, that numerous incidents of sexual discrimination and sexual harassment occurred substantially as propounded by the Plaintiff [23], and further, that "the attitude of the male hierarchy of the Defendant towards subordinate female employees was one of degradation which demonstrates a willingness and intent to discriminate against female employees."[24] And although the District Court found that the Defendant maintained

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[23] See page 3 of the memorandum decision.

[24] See pages 2-3 of the memorandum decision.

personnel policies that "create a suspicion about its fairness and offer an opportunity for disparate treatment to females",[25] the District Court nonetheless relied upon the fact that the Plaintiff was unwilling to accept a job paying less or a clerical job at the time she was terminated on June 30, 1978, to find that the Plaintiff's termination was not based upon discrimination.[26] The District Court's failure to order reinstatement of the Plaintiff was based upon the equally inconsistent and irrational finding that the Plaintiff was terminated for reasons other than discriminatory, when it is obvious from the memorandum opinion of the District Court itself, that the Plaintiff's

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[25] See page 3 of memorandum decision.

[26] See page 8 of memorandum decision.

termination was the result of a manipulative, calculated discrimination which had continued over a several year period.

CONCLUSION

WHEREFORE, UPON ALL OF THE FOREGOING REASONS, PETITIONER, ANN FERRELL DACUS, HEREBY PETITIONS THIS HONORABLE COURT AND PRAYS THAT THE WRIT OF CERTIORARI AS PETITIONED FOR HEREIN, SHOULD BE GRANTED.

Respectfully Submitted

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APPENDIX

OPINION OF

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN FERRELL DACUS,

Plaintiff-Appellant,
Cross-Appellee ,

V. Nos.79-1424-25

SOUTHERN COLLEGE OF OPTOMETRY,

Defendant-Appelle,
Cross-Appellant .

Decided and Filed August 5, 1981.

Before: Edwards, Chief Circuit Judge, Phillips and Peck, Senior Circuit Judges.

PER CURIAM. Plaintiff Dacus filed a complaint asserting sex discrimination under Title VII and also violations of 42 U.S.C. §§ 1981, 1982 and 1983(1976). She alleged that defendant customarily

created special titles for women, giving them job classifications with lower pay and working conditions for the same work done by male employees with higher conditions and pay standards.

The case was tried before the United States District Court in the Western District of Tennessee, resulting in a Memorandum Opinion by the District Judge. After a lengthy review of the evidence which had been presented, the court concluded:

The defendant acting through its high ranking male officers did discriminate against the female plaintiff by assigning her substantially all of the duties of the former Business Manager from October 1, 1972, through June 30, 1974. Similarly the discrimination continued the next year when the job office of Business Manager was combined with the Bookstore Manager in which the position the plaintiff continued until June 30,1975.

The Court further concludes that the plaintiff is entitled to damages based upon the difference between the salary being earned by Howard Hicks as Business Manager at the time of his termination- $10,296 per annum, or $858 per month- and the amount plaintiff was paid between October 1, 1972, and June 30, 1975. At that time plaintiff was transferred to the job of Administrative Aide to the Executive Vice President due to the appropriate determination by management that plaintiff was not suited to the job which required supervision. While it is true that plaintiff was replaced with a male Bookstore Manager at a salary of $9,420 per annum, this Court concludes that the transfer of plaintiff from the head of the office of the Business Manager to the Bookstore Manager was not intended to be a job of lesser responsibility or effort. Therefore, the plaintiff should have been compensated at the

at the same salary she should have earned while performing the duties of Business Manager.

These conclusions recognize and include a finding that the plaintiff was justifiable demoted to the salary level that she was actually paid from the time that she was transferred to the Administrative Aide position which was in fact an advanced clerical job.

The Court further finds that the limitation of the plaintiff's employment was not based upon discrimination against females, nor was it based upon retaliation for filing a claim with the EEOC. It was based upon the discretion of the employer to transfer, reassigh, or terminate an employee such as was done when Howard Hicks was terminated as Business Manager and the plaintiff was given substantially all of his duties but not his title or salary.

The court awarded backpay in the

amount of $8,253, with attorney's fees and costs of $5,072.50. Both parties appealed.

This court's review of this record indicates that we cannot hold that any of the findings of fact of the District Judge are clearly erroneous, therefore, the judgment of the District Court is affirmed.

The case is, however, remanded for the determination and allowance of appropriate appellate fees and expenses to appellant Dacus.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANN FARRELL DACUS,

Plaintiff,

vs. NO. 78-2026

SOUTHERN COLLEGE OF OPTOMETRY,

Defendant.

MEMORANDUM DECISION

This is the suit of a former employee of the defendant seeking monetary and injunctive relief, including reinstatement. Plaintiff brings the suit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. She charges that the defendant descriminated against her because she is a female in that she was paid less than male employees who were assigned similar jobs and that the defendant retaliated against her for filing a discrimination charge with the EEOC.

The defendant is a general welfare corporation. It is owned by a Board of

Trustees which also establishes the policies of the college and elects the officers. The defendant college, as its name reflects, operates an educational institution which grants degrees in the field of optometry.

During most of the period involved in this lawsuit the three highest ranking officers who were charged with administering the affairs of the college were Dr. Spurgeon Eure, the President; Dr. Vonne F. Porter, the Executive Vice President; and Claude Pullen, the Administrative Officer or Secretary Treasurer. In the hierarchy Dr. Eure was the chief executive of the institution. Most of the personnel decisions were handled by the Executive Vice President, who in turn delegated much of the supervisory function of the business affairs to Claude Pullen.

The proff the plaintiff offered established that the administrative hierarchy of the defendants, consisting of the

three men referred to above, treated female employees as inferior in many ways and that they exploited them as females, or attempted to do so, in various ways such as taking advantage of the fact that females are secondary wage earners in a family or supporters of themselves only. They also asked sexual favors from the subordinate female employees.

Ms. Doris Bell, who also has a sex discrimination case against the defendant pending in the another division of this Court, testified as a witness for the plaintiff in this cause. She corroborated the testimony of the plaintiff to the effect that plaintiff did the work of a previous business manager. She further testified that Dr. Eure had made unmistakable sexual proposals to her and threatened to prevent the issuance of an optometry license to her fiance.

The plaintiff testified that Dr. Vonne Porter, the Executive Vice President, made sexual proposals at work to her and placed his hands upon her in furtherance of the proposals, when no other persons were present. He denies this episode, but he admits that he made advances to Sandra Hodges in the parking lot of the college after they had enjoyed Christmas cheer in the office of Claude Pullen, the Administrative Officer. When he tried to pursue this further by telephoning her and proposing that he see more of her, she rejected him. It should be noted that he contends that she was responsive to his advances in the parking lot and later that night at her home, whereas she testified that she became upset at his sudden advances and did not encurage him.

Ms. Andrea Rankin testified that Claude Pullen made sexual passes at her. She made a complaint about this which ultimately caused the matter to be consid-

ered by the Board of Trustees. Mr. Pullen appeared before the Board, which apparently took no action. (There is no proof that the Board heard from Ms. Rankin.) In his testimony in this case Mr. Pullen denied that he made passes at Ms. Rankin, and testified that the only circumstance that occurs to him as a time when Ms. Rankin might have misunderstood him was an occasion when, having suffered a heart attack several days before, he was in Ms. Rankin's office where she was helping him with some outside work and he felt that he had to brace himself, at which time he might have touched M. Rankin.

On cross examination Mr. Pullen also acknowledged that Mrs. Aldridge and her husbnad, in the presence of Dr. Eure, accused him of making sexual advances to Mrs. Aldrige on three occasions. He denies this.

As the trier of facts this Court finds that the incidents described above

occurred substantially as the women testified. While the refusal to respond to sexual advances cannot be found to have caused a demotion or termination of a female employee nor the payment of a lesser salary, the attitude of the male hierarchy of the defendant towards subordinate female employees was one of degradation which demonstrates a willingness and intent to discriminate against female employees.

The plaintiff in this case commenced working for the defendant in 1968 as a faculty typist. She became a secretary to the Business Manager, Howard Hicks, on a partial basis effective April 1, 1970. Effective September 1, 1970, she was appointed secretary to the Business Manager on a full-time basis. She was reappointed for two additional annual terms which commenced July 1, 1971, and July 1, 1972, respectively. This was in accordance with

the policy of the school to announce personnel appointments in the spring of the year for annual terms commencing July 1. Of course changes could be made during the year in the event of a promotion or job transfer or termination for cause.

During the time that plaintiff was secretary for the Business Manager she gained a familiarity with the duties and actually commenced performing some of them under varying degrees of supervision from the Business Manager.

Howard Hicks was fired as Business Manager in September of 1972, effective October 31, 1972, but he left at the end of September. Effective October 1, 1972, the plaintiff was given the job title of Bookstore Manager Trainee; however, her salary remained the same as that which she had been awarded as secretary under her annual appointment. At the time she was Bookstore Manager Trainee she remained in the office space assigned to the Business

Manager and she was told by the Executive Vice President that she was qualified for the job of Business Manager. She assumed the duties formerly performed by the Business Manager except for supervision of some student apartments and the optical shop, which was closed. Later she moved to the desk of the former Business Manager and was assigned a secretary to work for her.

Effective July 1, 1o73, for her annual appointment plaintiff was promoted to the "technical and professional" category of the defendant's personnel. At that time her annual salary was increased from $5,724 to $7,270, and she was given the title of Assistant Business Manager, although there was no person who held the position of Business Manager. Her duties continued as they had been. During the last year that Howard Hicks served as Business Manager he was paid $10,296 per annum.

On March 12, 1974, the plaintiff filed with the EEOC a charge which stated as its basis the following:

> I have been denied the title and salary commensurate with work I have performed, as detailed in the attached affidavit and exhibits thereto.

Effective July 1, 1974, the plaintiff was appointed Bookstore Manager based upon a policy recommendation and plan made February 1, 1974, (T.E. 51) to combine the office of Business Manager and the Bookstore into one budgetary department. At that time her salary was increased to $8,496 per annum.

The record reflects that the Administrative Officer became concerned about the plaintiff's job performance, particularly as an administrator, in 1974. On October 7, 1974, the Administrative Officer recommended to the Executive Vice President that the plaintiff be put on a probationary status for the remainder of her

then current term, and that she not be given an appointment of employment in the business section after June 30, 1975, the end of her then current term (T.E. 52). Her next annual appointment was as Administrative Aide to the Executive Vice President at a salary of $9,420. At that time, a male, Robert G. Hunolt, was hired as Bookstore Manager at the same salary that the plaintiff was being paid.

Effective July 1, 1976, the plaintiff was again appointed Administrative Aide to the Executive Vice President, this time at a salary of $10,236. Effective June 30, 1977, she was reappointed Administrative Aide. However, at this time she was assigned to the Grant Office, which had been developed in January, 1977, for 60% of her time. The remaining 40% of her time was to be devoted to the office of the Executive Vice President. Her total annual salary was increased to $11,256.

In December 1977 her superior in

the Grant Office, Dr. Dunsky, gave her an extremely favorable evaluation in all categories except Leadership and Written Communication, in which he gave her zeros on a scale of 0 to 5. However, he recommended her for a salary increase (T.E. 25). By memo dated February 15, 1978, the President notified Dr. Dunsky and the plaintiff that the Grant Office would be abolished at the end of June 1978. He further stated that he would be happy to recommend them for other positions which they might seek, and he invited them to apply for any vacancies at the defendant institution for which they were qualified (T.E. 35).

Plaintiff applied for other positions, but she was not hired for any other position for the stated reasons that she was not qualified or there were others better qualified. In this regard it is noted that she was unwilling to accept a job paying less than she had been making and that she would not accept a clerical job.

Her employment with the defendant was terminated on June 30, 1978.

The proof reflects that the plaintiff and other aggrieved female employees had repeatedly asked for written statements of policy over personnel procedures, but that they were never given satisfactory answers. It is apparent from the proof that Dr. Porter, the Executive Vice President, and Claude Pullen, the Administrative Officer, were the persons who controlled and administered the personnel policies, and that they changed the policies frequently. In this regard one of the most troublesome problems arose over the very complex system for setting salaries. Dr. Porter devised it, Dr. Porter computed it, and only Dr. understood it. It was devised ostensibly as an objective salary index which would apply uniformly for all faculty and technical and professional employees. Perhaps it would apply more uniformly for faculty personnel; however,

the record does not reflect its applicability in that regard. But the record does reflect its ability for maneuverability and arbitrary applicability for the technical and professional personnel who have acquired experience and training on the job and from the clerical ranks. The index consists of four basic factors: rank, degree, longevity, and merit. The rank factor is based upon the position held in the hierarchy of the organization, which can be subjective with regard to some of the lower echelon administrative jobs. The degree factor means whether or not the person has an academic degree. In this category a person with a Ph.D. in Optometry receives a score of .40, whereas a person with only a high school diploma receives a minus .20. A Bachelor of Science degree is only minus .10. This factor is a disadvantage to the plaintiff and other females who acquired their knowledge of their jobs via experience. Furthermore,

the various degrees are not job related to some jobs such as Bookstore Manager. The merit factor is an evaluation on performance which is subjective and variable. The longevity factor is designed to compensate for length of service and experience; however, there is authority for the Executive Vice President to give credit for longevity to a new employee for similar experience at other places. This too may be variable.

In summary, the subjective and variable features of the index create a suspicion about its fairness and offer an opportunity for disparate treatment to females.

Conclusions

Based upon the above facts this Court concludes that the defendant acting through its high ranking male officers did discriminate against the female plaintiff by assigning her substantially all of the duties of the former Business Manager

from October 1, 1972, through June 30, 1974. Similarly, the discrimination continued the next year when the job office of Business Manager was combined with the Bookstore Manager in which the position the plaintiff continued until June 30., 1975. The Court further concludes that the plaintiff is entitled to damages based upon the difference between the salary being earned by Howard Hicks as Business Manager at the time of his termination -- $10,296 per annum, or $858 per month -- and the amount plaintiff was paid between October 1, 1972, and June 30, 1975. At that time plaintiff was transferred to the job of Administrative Aide to the Executive Vice President due to the appropriate determination by management that plaintiff was not suited to the job which required supervision. While it is true that plaintiff was replaced with a male Bookstore Manager at a salary of $9,420 per annum, this Court concludes that the transfer of plaintiff from the head of

the office of the Business Manager to the Bookstore Manager was not intended to be a job of lesser responsibility or effort. Therefore, the plaintiff should have been compensated at the same salary she should have earned while performing the duties of Business Manager.

These conclusions recognize and include a finding that the plaintiff was justifiably demoted to the salary level that she was actually paid from the time that she was transferred to the Administrative Aide position which was in fact an advanced clerical job.

The Court further finds that the limitation of the plaintiff's employment was not based upon discrimination against females, nor was it based upon retaliation for filing a claim with the EEOC. It was based upon the discretion of the employer to transfer, reassign, or terminate an employee such as was done when Howard Hicks was terminated as Business Manager

and the plaintiff was given substantially all of his duties but not his title or salary.

The damages to which the plaintiff is entitled are:

	Equivalent of Howard Hicks Salary	Less Amount Paid to Plaintiff	Difference
10/1/72 to 6/30/73	@ $858 per month = $7,722.00	@ $477 per month = $4,293.00	$3,429.00
6/30/73 to 7/1/74	@ $858 per month = $10,296.00	@ $606 per month = $7,272.00	$3,024.00
7/1/74 to 6/30/75	@ $858 per month = $10,296.00	@ $708 per month = $8,496.00	$1,800.00
		TOTAL:	$8,253.00

The Court further finds that the costs shall be assessed against the defendant, and that these costs shall include an attorneys fee and expenses for the attorneys for the plaintiff. These fees and expenses are computed and allowed upon the basis hereinafter set forth:

The Court finds from proof of ocunsel for the plaintiff that 22½ hours were spent by counsel in preparation for trial, not including deposition time. This time consisted of 5½ hours in four client interviews; 5 hours in preparation of Complaint; two pre-trial memos, drafting and filing subpoenas for trial; 6 hours in factual preparation including accumulation and review of records and exhibits; 6 hours in research and witness interviews; and the drafting of 31 letters. The Court further finds that 10½ hours were spent in attending the discovery deposition of the complainant and the taking of the deposition of Dr. Vonne

F. Porter on February 14, 1979. The Court further finds that complainant's counsel spent four full days in trial -- namely February 21, 22, 23, and 27, 1979 -- with favorable judgment being given at 6:00 P.M. on February 27, 1979. Counsel also spent 3½ hours on March 12, 1979, preparing proposed Findings of Fact and Conclusions of Law. Thus, the Court finds that Counsel spent 27 hours in pre and post trial preparation; 10½ hours in depositions and four complete days in trial. Due to the complexity of the case and counsel's experience in these cases, the Court is of the opinion that counsel should be compensated for services performed at the rate of $65 per hour for all out of court work and $500 a day for trial days. Thus, the Court will award the complainant's counsel, Phillip E. Kuhn, the total sum of $4,837.50 trial fee, plus trial expenses of $235 representing a deposition bill of $117.50 plus filing fees and postage for

a total amount of $57.50.

The Clerk will prepare a judgment for the plaintiff, Ann Ferrell Dacus, in the amount of $8,253 with the costs including an attorney's fee and expenses in favor of Phillip E. Kuhn in the total amount of $5,072.50 being assessed against the defendant, Southern College of Optometry.

ENTER: This 3rd day of July 1979.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

(7/63)

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE

WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION FILE NO. C-78-230

ANN FARRELL DACUS

vs.

SOUTHERN COLLEGE OF OPTOMETRY

JUDGMENT

This action came on for trial ~~(hearing)~~ before the Court, Honorable Robert M. McRae, Jr., United States District Judge, presiding, and the issues having been duly tried ~~(heard)~~ and a decision having been duly rendered, in favor of the Plaintiff.

It is Ordered and Adjudged that in compliance with the Memorandum Decision entered July 3, 1979, that Judgment be entered for the Plaintiff, Ann Ferrell Dacus in the amount of $8,253 with the costs including an attorney's fee and expenses in favor of Phillip E. Kuhn in the total amount of $5,072.50 being assessed agains the defendant, Southern College of Optometry.

APPROVED:

ROBERT M. McRAE, JR., JUDGE

FILED

Dated at Memphis, Tennessee, this 12th day of July, 19 79

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Clerk of Court

CERTIFICATE OF SERVICE

I, William E. Shepard, do hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States that I am a member of the Bar of the Supreme Court of the United States, and that I have served three copies of the foregoing, attached PETITION FOR WRIT OF CERTIORARI upon each of the Attorneys of Record for Southern College of Optometry, Melvin Fleischer, of the firm of Cochran, Carey, Fleisher, and Mullican, and Etrula R. Trotter of the firm of Weintraub, Dehurt, Robinson, and Coggin, by depositing said copies of said PETITION FOR WRIT OF CER-TIORARI in a United States mailbox, first class postage prepaid, properly addressed to their respective post office addresses located at Suite 3105, 100 North Main Building, Memphis, Tennessee 38103, and Suite 2560, One Commerce Square, Memphis, Tennessee 38103, on this 3rd day of

November, 1981, in compliance with paragraph 3 of Rule 28 of the Supreme Court of the United States. Certification is hereby further made that Southern College of Optometry is the only party required to be served and that Southern College of Optometry's Attorneys of Record in this cause and their respective addresses are as listed above.

William E. Shepard

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ANN FERRELL DACUS

Opposition

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-831

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANN FERRELL DACUS,

PETITIONER,

VS.

SOUTHERN COLLEGE OF OPTOMETRY,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATUTES

42 USC Sec. 2000e-5 (e)

REPLY TO
BASIS FOR FEDERAL JURISDICTION

In respect to the jurisdiction of this court, the trial court and the Sixth Circuit, respondent maintains its position that jurisdiction does not exist on the basis that plaintiff's charge was filed on March 12, 1974,[4] more than 180 days after October 1, 1972, the time the alleged discrimination occurred. 42 USC, Sec. 2000e-5 (e). In this regard, no continuing acts of discrimination were claimed or shown, petitioner making the statement in a discovery deposition prior to trial that the sole basis of her complaint against respondent was respondent's failure to promote her to business manager in October of 1972. (See page 18 infra). The trial court refused to consider this issue as timely raised because

[4]See Pet. Cert. at 48.

it was raised by Motion to Dismiss rather than Motion for Summary Judgment. (See pages 19, 20 infra). The court of appeals did not consider this issue in its opinion, although challenged in that Court (Pet. Cert. at 35, 17, 18).

It is our position that the alleged act of discrimination was claimed and found by the District Court to have occurred on October 1, 1972 and that, although there had allegedly been a continuing impact after October 1, 1972, such continuing impact was simply the present effect of a past act of alleged discrimination. (United Air Lines, Inc. vs Evans, 97 S Ct 1885 at 1889, and Delaware State College vs Ricks, 101 S Ct 498 at 503 et seq.)

REPLY TO FIRST QUESTION PRESENTED FOR REVIEW AND PETITIONER'S ARGUMENT THEREFOR

1. It is our contention that there is no need for the Court to grant certiorari in this case on the grounds set forth by petitioner. In this respect, the assessment of backpay is, and should be, in large manner in the discretion of the trial court, absent a clear abuse of discretion.[1] Preciseness in the assessment of backpay cannot be the rule in view of the varying factors involved in each case. The complexity of arriving at a mathematically precise award makes it impossible for any rule to be universally applicable to determination of the

[1] Franks vs Bowman, 96 S Ct 1251 at 1267 (1967). "The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts."

myriad of factors involved. Furthermore, if exactness or preciseness governed the measure of damages, numerous appeals would be encouraged unnecessarily and unjustifiably by both the employer and the employee, notwithstanding that substantial justice would be reached by the rule that leaves the measure of damages in the discretion of the court absent an abuse thereof.

Consequently, as long as the trial Court uses a measure of damages that substantially meets the objective of making the employee whole by a judgment reasonably or equitably calculated to measure the difference between actual earnings and the amount the employee would have earned,

the trial court's award should not be disturbed.[2]

2. It is our further contention that certiorari should not be granted in the instant case because the district court did arrive at backpay with the "make whole" objective in mind. The trial court arrived at an equivalent salary to that which petitioner would have earned, absent the alleged discrimination. Thus, the court determined the equivalent to be the salary of the former business manager at his termination with the merit and longevity increases he had earned, rather than a business manager starting salary equivalent (Pet. Cert. at 54, 56). This measure of damages, in fact, resulted in a larger award than

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[2]Albermarle Paper Company vs Moody 95 S Ct2362 at 2373 (1975) " . . . the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."

petitioner would have received had the alleged discrimination not occurred. While petitioner claims that the "equivalency" figure did not include "increases that petitioner would be entitled to receive", a review of what petitioner would have earned pursuant to the salary structure of respondent had she received the promotion to business manager in due course will show that the court's award exceeded the amount respondent would have received absent the alleged discrimination.

In this respect, the trial court used as the equivalent of what respondent would have earned the salary of the business manager at the time of his termination. (Pet. Cert. at 54). In the first place, this figure ($10.296.00 per annum)

is not what petitioner would have received had she been appointed to the position of business manager on October 1, 1972.

Respondent, an educational institution, employed administrative personnel under a contract for a yearly appointment on a fiscal year basis from July 1 to June 30. (See pages 22 and 23 infra). The salary structure provided that no contractual or salary changes would be made where there was a change of duties during a fiscal year contractual appointment. (See page 23 infra).

Accordingly, if respondent had actually assigned petitioner the duties of business manager on October 1, 1972, her salary would not have been changed until the succeeding contractual appointment on July 1, 1973.

Therefore, applying the criterion that the measure of backpay is what the employee would have earned absent the discrimination, no backpay would be assessed for the period from October 1, 1972 through June 30, 1973. This would mean that the trial court's calculation of backpay for this period at $3,429.00 would be an amount petitioner would not have earned absent the discrimination. (Pet. Cert. at 56).

To determine the salary petitioner would have earned for the succeeding years, the salary structure of respondent should be considered. In this respect, repondent determined salaries on the basis of a salary index. The salary index was based on a numerical figure given the employee for his position or rank at the college, his educational attainment, his longevity, and his merit. The resulting index

would then be multiplied by the consumer price index base salary for the year in which the salary was determined. Thus, the starting salary for the former business manager was determined by multiplying his salary index of .74 by the consumer price index figure of $10,200.00 for the 1969-70 year, which calculated to be $7,548.00. (See pages 24 and 25, infra).

Accordingly, utilizing the starting salary index of the former business manager of .74 as the equivalent of what petitioner would have earned absent the alleged discrimination had petitioner started at the same starting level of the former business manager, the index of .74 would be multiplied by the consumer price index for the 73-74 fiscal year of $12,324.00 resulting

in a salary equivalent of $9,120.00 for the business manager's position. (See page 24 infra). Deducting plaintiff's actual salary of $7,272.00, this would have resulted in a differential in pay of $1,848.00, the $3,024.00 calculated by the court on the equivalency figure it used being in excess of what petitioner would have actually received for her first yearly contractual appointment to the position of business manager, absent the alleged discrimination.

Similarly, giving petitioner the benefit of all increases in the salary index of the former business manager for his second year as business manager, the equivalent index would be .79 for her second year of employment as business manager. (See page 25, infra.) Thus, the equivalent salary index of the business manager for his second year of employment, .79 would

be multiplied by the consumer price index for the 74-75 year, $13,920.00 (See page 24, infra), resulting in a salary equivalent for that year of $10,997.00. Subtracting therefrom plaintiff's actual salary in the amount of $8,496.00 for that period, the salary differential would be $2,501.00.

Thus, summarizing the foregoing, had petitioner been assigned the duties of business manager on October 1, 1972 and continued at the business manager's salary level until June 30, 1975 and giving her the benefit of increases earned by the former business manager, the additional salary she would have earned absent the alleged discrimination would have been $1,848.00 plus $2,501.00 or a total of $4,349.00. Thus, the $8,253.00 backpay awarded by the trial court is not less than the

equivalent of what petitioner would have earned in that position absent the alleged discrimination, but calculates to a figure in excess of what she would have earned.

Even if it were assumed that petitioner should receive a backpay allowance for the 1972-73 year, notwithstanding the salary structure not allowing salary changes during a contractual appointment, the calculations would reveal that the backpay award of $8,353.00 did not result in a lower measure of backpay than petitioner would have earned as business manager absent the alleged discrimination.

Accordingly, there is no need for the granting of certiorari in the instant case based on petitioner's contention that the trial court did not use a formula for determining backpay that did not incorporate the criterion of measurement as to what the

plaintiff would have earned. The foregoing mathematical calculations further illustrate the complexity of measuring backpay awards and the practical mecessity of leaving the measurement of backpay in the discretion of the trial court, absent a clear abuse of such discretion.

In addition, the foregoing factors further illustrate that there is no need for the granting of certiorari in the instant case, as no justification for relief is apparent, and no reason for altering the present rules for measurement of backpay is shown by petitioner.

REPLY TO SECOND QUESTION PRESENTED FOR REVIEW AND PETITIONER'S ARGUMENTS THEREFOR

As to petitioner's other contention that the decision of the Sixth Circuit departed substantially from accepted judicial procedures and standards, it is our contention that there in deed was no departure in so far as petitioner is concerned. In this respect, petitioner claims that the finding that she was not discriminated against when she was terminated on June 30, 1978 was clearly erroneous and inconsistent with the other factual determinations of the district court itself. It would appear that this contention relates to a factual finding that is to be deemed conclusive by the well-established rule that concurrence by the court of appeals with the trial court's findings

is conclusive as to such factual matters.[3] If certiorari were to be granted to re-consider the factual findings in this case, all the facts would have to be reviewed by this court. This would mean that respondent's contention that there was no basis for a finding of sex discrimination would be open for review, as well as our contention in the Sixth Circuit that there was no causal relationship shown from the evidence between the alleged sexual incidents and petitioner's job or salary status, the alleged sexual incidents (which respondent strongly denies having occurred and upon which the trial court's finding of sex

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[3] Bochner vs Pennsylvania B. Co., 40 S Ct at 409 (1920) " . . . the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence."

discrimination was based) allegedly occurring after the time the discrimination was found to have taken place, October 1, 1972.

Accordingly, the factual contentions of petitioner inherently involved in her question presented for review in this regard affords no basis for the granting of certiorari.

In addition, there is nothing inconsistent in the factual determination of the District Court itself. That court found that petitioner's job performance as adminstrator proved not to be satisfactory and that she was justifiably demoted from her administrative position to an "advanced clerical job" on June 30, 1975, and that such limitation on her employment was not based upon discrimination

against females." (Pet. Cert. at 54, 55, 48, 49). Thus, the district court's original finding of sex discrimination actually constituted a finding of discrimination in failure to promote only, rather than a continuing course of discrimination. Consequently, petitioner's later termination in June of 1978 as found by the district court was for reasons other than sex (Pet. Cert. 49, 50), and is entirely consistent with its other factual determinations.

EXCERPT FROM PAGE 18 OF APPENDIX
FILED IN SIXTH CIRCUIT

Testimony of Petitioner from
Discovery Deposition

Q. Now, then, it's your contention and position that you should have been promoted to business manager in October of 1972, when Mr. Hicks left?

A. Yes, sir.

Q. And is that the basis of your complaint against the Southern College of Optometry?

A. Yes, sir.

Q. Is that the sole basis of your complaint against the Southern College of Optometry?

A. Yes, sir.

EXCERPT FROM PAGE 52 OF APPENDIX
FILED IN SIXTH CIRCUIT

District Court's ruling on Motion to Dismiss:

I notice we have a supplemental memorandum with regard to the Motion to Dismiss. I read it, but I'm still of the opinion that the Motion to Dismiss was not timely filed, and I think the supplemental memorandum in re the Motion to Dismiss was even more untimely filed. So I overrule it, if it is a motion.

The Motion to Dismiss I consider a Motion for a Summary Judgment, which was not filed within the time the rules of this Court require it be filed, and it does involve a factual matter. I don't want to waste any more time on that.

EXCERPT FROM PAGE 19 OF APPENDIX
FILED IN SIXTH CIRCUIT

Part of Supplemental Memorandum in re Motion to Dismiss:

At the pre-trial conference on February 2, 1979, the Court referred to defendant's Motion to Dismiss as a Motion for Summary Judgment and indicated that, since such Motion was filed on January 26, 1979, it was not a timely Motion in that it was not filed prior to 30 days of the trial date, the Court further indicating that it would not rule on such Motion on that account prior to trial.

We submit that a Motion to Dismiss, even though it considers matters outside of the pleadings, has been held not to constitute a Motion for Summary Judgment. In this connection, prior to the expanded use of Motions for Summary Judgment, matters outside

of pleadings could be considered on a Motion to Dismiss. The case of Exchange National Bank vs Touche Ross and Co., 544 F 2d 1126 (CA 2d, 1976), held that such a Motion does not constitute a Motion for Summary Judgment. While the Court in that case recognized a conflicting ruling in the Ninth Circuit, it held that a Motion to Dismiss is distinguished from a Motion for Summary Judgment in that a Motion to Dismiss does not operate as res adjudicata whereas a Motion for Summary Judgment so operates.

Another distinction between a Motion to Dismiss and a Motion for Summary Judgment is that even after a Motion to Dismiss is filed, plaintiff can obtain a voluntary dismissal,

EXCERPT FROM PAGE 387 OF APPENDIX
FILED IN SIXTH CIRCUIT

Annual Appointment of Ann Dacus for 71-72 fiscal year:

NOTICE OF APPOINTMENT

April 15, 1971

To: Ann Ferrell

From: Executive Vice President

Subject: Employment for period 7/1/71 - 6/30/72

Your annual salary for the subject period will be $5,124 to be paid in monthly checks of $427 each before deductions.

You will be eligible for 2 weeks vacation with pay over and above all school holidays.

Job designation Secretary to Business Manager.

Your supervisor will be Business Manager, who is responsible for recommendations concerning your status and job description.

EXCERPTS FROM SUPPLEMENTAL APPENDIX FILED IN SIXTH CIRCUIT

Testimony of Ann Dacus from page 453:

Q. All right, and that was an appointment -- the College made yearly appointments, is that correct?

A. Yes, sir.

Testimony of Dr. Porter, Executive Vice-President of Southern College of Optometry from page 463:

In mid-year, actually during the fiscal year, we don't make contractual changes.

Testimony of Dr. Porter, Executive Vice-President of Southern College of Optometry from page 466:

That, of course, being just a change of duties in mid-year that, of course, no salary changes or anything at that time.

EXCERPT FROM PAGE 518 OF SUPPLEMENTAL APPENDIX FILED IN SIXTH CIRCUIT

Consumer Price Index Figures for 1969-70 through 1973-74

Year	Salary Base
69-70	$10,200
70-71	$10,156
71-72	$11,364
72-73	$11,844
73-74	$12,324

EXCERPT FROM PAGE 407 OF APPENDIX
FILED IN SIXTH CIRCUIT

Employee Salary Record of
Howard S. Hicks:

	1969-70	1970-71
Position	1.00	1.00
Rank	-.18	-.18
Degree	-.10	-.10
Longevity	.01	.02
Merit	.01	.05
Sal. Index	.74	.79
Sched. Sal.	$7,548	$8,758
Actual	$7,548	$8,760

	1971-72	1972-73
Position	1.00	1.00
Rank	.12	-.12
Degree	.10	.10
Longevity	.03	.04
Merit	.05	.05
Sal. Index	.86	.87
Sched. Sal.	$9,768	$10,296
Actual	$9,768	$10,296

CONCLUSION

WHEREFORE, UPON THE FOREGOING REASONS, RESPONDENT, SOUTHERN COLLEGE OF OPTOMETRY, HEREBY PRAYS THIS HONORABLE COURT THAT PETITIONER'S WRIT OF CERTIORARI BE DENIED.

Respectfully Submitted

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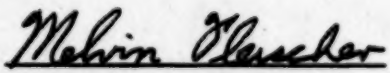
MEMPHIS, TN. 38103
(901) 523-1508

CERTIFICATE OF SERVICE

I, Melvin Fleischer, do hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States that I am a member of the Bar of the Supreme Court of the United States, and that I have served three copies of the foregoing, attached BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon William E. Shepherd, Attorney for Ann Ferrell Dacus by depositing said copies of said BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the United States mails, postage prepaid, properly addressed to his respective post office address located at 55 North Third Street, Memphis, Tennessee 38103, or by hand delivery to such offices, this 25th day of November, 1981,

in compliance with paragraph 3 of Rule 28 of the Supreme Court of the United States. Certification is hereby further made that Ann Ferrell Dacus is the only party required to be served and that Ann Ferrell Dacus's attorney of record in this cause and his respective address is as listed above.



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COUNSEL OF RECORD
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